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No. 95-1133

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated,

Petitioners,

v.

CONOCO INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires, in addition to notice to interested parties of an Oklahoma Corporation Commission ("OCC") proceeding and opportunity to be heard, that such parties be given notice that the OCC's determinations may not be collaterally attacked by such parties in other proceedings.

2. Whether 52 Okla. Stat. 1991, §111 violates the Due Process Clause of the Fourteenth Amendment because it prohibits a collateral attack on an OCC order in other proceedings asserting private rights which the OCC would have lacked jurisdiction to determine.

3. Whether a party who had notice and opportunity to participate in proceedings wherein the OCC disallowed the drilling of any offset well, but voluntarily failed to participate in those proceedings, is denied due process by a state prohibition against collateral attack which prevents that party from suing the unit operator for damages for failure to drill such an offset well.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

Respondent C.I.G. Exploration, Inc. is wholly owned by Colorado Interstate Gas Company, and has no subsidiaries.

Respondent Conoco Inc. was formerly named "Continental Oil Company" (Aplt. App. 1, caption). Its parent company is E.I. du Pont de Nemours and Company, and its subsidiaries which are not wholly owned are:

1 Big Sky Of Montana Realty, Inc.
2 C&L Processors Partnership
3 Cit-Con Oil Corporation
4 Conch International Methane Limited
5 Conoco Arabia Ltd.
6 Conoco Iraq Ltd.
7 Conoco Mexico Ltd.
8 Conoco Oriente Ltd.
9 Conoco Peru Ltd.
10 Conoco Venezuela Ltd.
11 Cure Inc.
12 Du Pont Energy Company
13 Excel Paralubes
14 Felix Oil Company
15 Gulf Coast Fractionators
16 Jupiter Holding, Inc.
17 Kettleman North Dome Association
18 Marine Preservation Association
19 Nelson Industrial Steam Company (NISCO)
20 Oberrheinische Mineraloelwerke GmbH (OMW)
21 Petco Enterprises Ltd.
22 Petrocokes, Ltd.
23 Phoenix Park Gas Processors, Ltd.
24 Pocahontas Gas
25 Siam Conoco Land Ltd.
26 The Standard Shale Products Company

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

52 Okla.Stat. 1991, §111 is the Oklahoma statute upon which the Tenth Circuit's decision is based. It is neither cited nor quoted in the Petition for Writ of Certiorari ("Petition"). It provides in relevant part:

> No collateral attack shall be allowed upon orders, rules and regulations of the [Oklahoma Corporation] Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the [Oklahoma] Supreme Court.

52 Okla.Stat. (Supp. 1995), §87.1(e) provides in relevant part:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the [Oklahoma Corporation] Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.

STATEMENT OF THE CASE

Introduction and Related Case: Respondents are lessees of mineral interests in Section 14, T14N, R16W, Custer County, Oklahoma ("Section 14"). Petitioner's Appendix

("Pet. App.") 3.[1] Petitioners sued respondents in this case alleging breaches of the duty to prevent drainage by failing to cause an additional well to be drilled in Section 14. Pet.App. 4-5; Petitioners' Supplemental Appendix ("Pet.Supp.App.") 4-5, 14. The same allegations were made against respondent Conoco Inc. ("Conoco") by other mineral owners in Section 14 in *Ruyle v. Continental Oil Co.*, 44 F.3d 837 (10th Cir. 1994), *cert. denied*, 116 S.Ct. 272, *rehearing denied*, 116 S.Ct. 557 (1995).

In both cases plaintiffs sued Conoco for failing to drill an offset well to prevent alleged drainage from Section 14 into Section 15 – notwithstanding that the Oklahoma Corporation Commission ("OCC") had prohibited the drilling of such an additional well, in proceedings as to which the record shows all plaintiffs, in both this case and *Ruyle*, received notice and opportunity to be heard. The difference between this case and *Ruyle* is that in *Ruyle* the plaintiffs did participate in the OCC proceedings. In this case plaintiffs voluntarily chose not to participate.[2]

In *Ruyle* a different panel of the Tenth Circuit (with no common judges) held that plaintiffs in that case were barred by collateral estoppel, and also barred by the

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[1] The Court of Appeals' opinion does not contain the numerous typographical, spelling, and other errors (including omission of most footnote numbers) found in Petitioners' reproduction in their Appendix. The Court can still determine the footnote to which the text refers, since the Appendix does keep footnotes on the same pages as the corresponding text footnote numbers.

[2] Plaintiffs here are represented by the same counsel as were petitioners in *Ruyle* in the Tenth Circuit and in this Court.

prohibition on collateral attacks from seeking damages from Conoco based on its failure to drill a well which the OCC had already disallowed. *Ruyle, supra,* 44 F.3d at 843-45. In the instant case, the Tenth Circuit applied only the latter of these two doctrines, that which prohibits a collateral attack on OCC orders, and did not reach the issue of collateral estoppel. Pet.App. 14-15.[3]

An understanding of the basis of the Tenth Circuit's decision requires discussion of the underlying OCC proceedings.

OCC Proceedings: On August 7, 1978 the OCC established Section 14 and adjacent sections as single drilling and spacing units of 640 acres each for production from a common source of supply, pursuant to 52 Okla.Stat. (Supp. 1995), §87.1(a). 10th Cir. Supp. App. 11.[4] The spacing order allowed a single well to be drilled in Section 14, and Conoco was designated the operator of that well. Oklahoma statutory law prohibited anyone including respondents from drilling any further wells into the spacing unit, except as permitted by the OCC. 52 Okla.Stat. (Supp. 1995), §87.1(e), quoted above.[5]

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[3] Petitioners' assertion that the Tenth Circuit opinion "divests hundreds of thousands of individuals who have legitimate claims against their lessees for fraudulent drainage" (Petition at 3) is wholly unsupported by the record and incorrect.

[4] References to "10th Cir. Supp. App." are to the December 13, 1994 Supplemental Appendix of Appellees in the Tenth Circuit in this case.

[5] "Under Oklahoma law, only one well is permitted in a spacing or drilling unit, such as section 14, unless the OCC authorizes an additional well." Pet.App. 19.

In 1992 the OCC denied an application of Great Bear Exploration, Inc. ("Great Bear") to drill an additional well in Section 14 to protect the unit well from drainage. Pet.App. 5-6. Both lower courts found that the record showed that petitioners here were duly notified of the Great Bear proceeding (Pet.App. 5, Pet.Supp.App. 30-31); the OCC specifically found that notice had been given in all respects as required by law and the OCC's own rules. *Id.*; 10th Cir. Supp. App. 44, ¶3. Petitioners' assertions that the notices sent to them "did not inform [them] of the purpose of the proceedings before the Commission" and that they "were not informed that the proceedings had to do with drainage issues" (Petition at 7) are incorrect.[6] Additionally, each of petitioners' leases expressly provided that the lessees would be excused from liability for failure to perform any provision of the lease, where performance was prevented by any federal or state law, executive order, rule or regulation, or similar agency action. Pet.App. 19-20. Thus petitioners also had actual knowledge that the OCC proceedings would affect respondents' obligations under their leases.[7]

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[6] The notice was accompanied by the application which included Great Bear's allegations of the need for an additional well (10th Cir. Supp. App. 52). Petitioners were also mailed separate notice of the hearing on the application. *Id.* at 68. Before the hearing petitioners were mailed additional notice of a separate amended application and notice of hearing. *Id.* at 93 and 102. As to drainage, *see* Pet.App. 48 n.14.

[7] Three of the petitioners here had even entered into agreements "authorizing Great Bear to act on their behalf to have another well drilled in section 14." Pet.App. 11-12.

In the Great Bear proceedings, the OCC rejected the contention that an additional well was needed to protect Section 14 from drainage, found that any drainage that was occurring was compensated by counter-drainage into Section 14,[8] and found that another unit well would injure correlative rights of mineral owners in adjoining units. Pet.App. 6. The OCC expressly found that the existing well "has and will continue to recover for the owners in Section 14 . . . their fair share of the gas in the Des Moines common source of supply." Pet.Supp.App. 18. The OCC held:

> The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in *GMC Oil and Gas Co. v. Texas Oil and Gas Corp.*, 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share.

Pet.Supp.App. 20. The OCC found that an additional well would violate the rights of owners in other sections

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[8] Uncompensated drainage, *i.e.*, drainage not compensated by counter-drainage, is the test for whether an additional well within an OCC drilling and spacing unit is warranted. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606 (10th Cir. 1992). Drainage and correlative rights are "directly related." *Id.* at 606.

adjoining Section 14. Pet.App. 6. The OCC thus denied the application to drill another well. Pet.Supp.App. 19-20.

The OCC's order was affirmed on appeal by the Oklahoma Court of Appeals, and the Oklahoma Supreme Court denied review by certiorari. Pet.App. 6-7; Pet.Supp.App. 21.

Throughout all of these proceedings respondents remained prohibited by Oklahoma statutory law and the OCC's original spacing order from drilling an additional well into Section 14 – as were all parties including petitioners and Great Bear. This prohibition has continued from the time the spacing unit was established, throughout the OCC proceedings and affirmance of the OCC's order rejecting the application for another well, and was still in effect when this brief was filed.

Lower Court Proceedings: After Great Bear failed to prevail in the OCC, petitioners here each entered into contracts with Great Bear's assignee, Kirkland Royalty, Inc., authorizing Kirkland to protect their interests in Section 14. Pet.App. 7; Pet.Supp.App. 7. "Kirkland brought this action on behalf of the plaintiffs [*i.e.*, petitioners here] and is controlling and paying for this litigation." Pet.App. 7.[9]

Petitioners here, like plaintiffs in *Ruyle*, brought this action against respondents for failure to cause the drilling

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[9] Kirkland is also named as an additional plaintiff and appellant in the proceedings below. Pet.App. 1.

of an additional well in Section 14 which was indisputably prohibited by state law.[10] In *Ruyle* the district court submitted the claim to jury trial, and the Tenth Circuit reversed. In the instant case a different district judge granted partial summary judgment (before the reversal in *Ruyle*) (Pet.Supp.App. 1, 13), and the Tenth Circuit affirmed.

The Tenth Circuit based its decision in this case on Oklahoma's prohibition on collateral attacks of OCC orders, *see* 52 Okla.Stat. 1991, §111 (Pet.App. 14-15), an issue not addressed in the Petition. The court held that "the trial court correctly concluded that Conoco and CIGE did not breach any duty to the plaintiffs by not drilling a well they could not lawfully drill." Pet.App. 21.

The court held that if plaintiffs wanted relief from the order prohibiting an additional well in Section 14, they could apply to the OCC. Pet.App. 50-51. Moreover, the court held, to the extent that plaintiffs' claims were based on allegations that Conoco misrepresented facts to the OCC, that also was a matter to be presented to the OCC. *Id.*[11]

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[10] Petitioners' assertion that respondents were required to seek further relief from the OCC notwithstanding its order, and regardless of the previously determined adverse effect on correlative rights of other mineral owners, is contrary to Oklahoma law (Pet. App. 21-23, 29-31).

[11] Petitioners' incorrect assertion that Conoco manipulated facts (with "two sets of data") in the OCC proceedings in which petitioners did not participate (Petition at 4) illustrates the kind of collateral attack which Oklahoma law prohibits. Any attempt to avoid the effect of the OCC order based on intrinsic fraud must be presented to the OCC. *See* Pet.App. 23-25, 50-51. *Leck v.*

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS PROPERLY APPLIED OKLAHOMA LAW PROHIBITING COLLATERAL ATTACKS

The first question presented (Petition, p.i) is one expressly *not* reached by the Court of Appeals (Pet.App. 14-15); it is among those noted in the court's footnote 3 (Pet.App. 15).[12] Petitioners ignore the ground upon which the Court of Appeals *did* base its decision – that petitioners are prevented from collaterally attacking the OCC order regardless of collateral estoppel.[13]

The Court of Appeals noted in its opinion that "a person can be barred from collaterally attacking an order entered in a proceeding to which he or she was not a

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Continental Oil Co., 800 P.2d 224, 230 (Okla. 1989); 52 Okla.Stat. 1991, §§111 and 112.

[12] Petitioners do not concisely frame the issue here, but in the Court of Appeals they argued that they could not be collaterally estopped without receiving notice specifically stating that the OCC would consider claims of drainage from Section 14 in determining whether to allow the proposed additional well. As the Court of Appeals states in its opinion (Pet.App. 48 n.14):

> The OCC could only authorize another well in section 14 to prevent waste or to protect correlative rights. *See* Okla. Stat. Ann. tit. 52 §87.1(a). Drainage is perhaps the most common factor affecting correlative rights. [Citation omitted.] We believe the plaintiffs were sufficiently apprised of the fact that drainage could be an issue in the OCC proceedings.

[13] They also gave relatively little attention to the issue in the Court of Appeals, although it was a primary focus of respondents' briefs.

party." Pet.App. 15. While the record shows that petitioners were given notice and opportunity to participate in the OCC proceedings and elected not to participate, petitioners neither acknowledge nor challenge the Court of Appeals' holding that it is irrelevant to its decision whether they were parties at all.

In any event, the collateral attack doctrine was correctly applied. 52 Okla.Stat. 1991, §111 provides:

> No collateral attack shall be allowed upon orders . . . of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders . . . to the Supreme Court.[14]

Thus when a party, "although having legal notice, failed to appear and participate in the original hearing" before the OCC, that party may not collaterally attack the OCC's order which has become final. *Phillips Petroleum Co. v. Corporation Comm'n*, 482 P.2d 607, 610-11 (Okla. 1971).[15] Other jurisdictions apply similar rules forbidding collateral attacks on the orders of their respective oil and gas boards or commissions.[16]

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[14] *See Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 (Okla. 1981).

[15] *See also Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987).

[16] *Mize v. Exxon Corp.*, 640 F.2d 637, 640 n.3 (5th Cir. 1981) (citing illustrative authorities from other jurisdictions).

The only method to successfully launch a collateral attack on an OCC order is to show on the face of the order that it is void because the OCC lacked jurisdiction over the subject matter, the parties, or to pronounce the particular decision.[17] Although the OCC's jurisdiction to issue the order may be challenged at any time, and the OCC always has power to change its order based on changed conditions, any other attempted modification of the order is a prohibited collateral attack.[18] Even the OCC may not collaterally attack one of its prior orders which it had jurisdiction to issue, although the OCC may supplement or clarify the order.[19]

A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of the OCC's decision in an incidental proceeding other than by appeal, writ of error, certiorari or motion for new trial. Pet.App. 16.[20]

> [Oklahoma's] protection against an impermissible collateral attack prevents both the district court and the Commission from encroaching

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[17] *SKZ, Inc. v Petty*, 782 P.2d 939, 943 (Okla. 1989); *Wagner & Brown v. Ward Petroleum Corp.*, 876 F.Supp. 255, 258 (W.D.Okla. 1994).

[18] *Inexco Oil Co. v. Oklahoma Corporation Comm'n*, 767 P.2d 404, 406 (Okla. 1988), *cert. denied sub nom. Ward Petroleum Corp. v. Louisiana Land and Exploration*, 490 U.S. 1040 (1989).

[19] *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388, 1391-92 (Okla. 1989).

[20] *Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 n.4 (Okla. 1981); *Holder v. Genie Oil & Gas Corp.*, 885 P.2d 1388, 1391 (Okla.Ct.App. 1994); *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388, 1391 (Okla. 1989); *State ex rel. Commissioners of the Land Office v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979).

> upon each other's jurisdiction by entertaining inquiries into issues that stand decided by the other tribunal.[21]

An action asserting a claim which seeks relief at variance with an OCC order or requires an interpretation of the order constitutes a prohibited collateral attack. *E.g., Woods Petroleum Corp. v. Sledge*, 632 P.2d 393 (Okla.1981) (quiet title action); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209 (Okla.Ct.App. 1987) (action seeking damage for conversion, discussed below); *Drake v. Southwest Davis Unit*, 698 P.2d 15 (Okla. 1985) (action for accounting); *Shell Oil Co. v. Keen*, 355 P.2d 997 (Okla. 1960) (action for accounting).

Pelican Production Corp. v. Wishbone Oil & Gas, Inc., 746 P.2d 209 (Okla.Ct.App. 1987) illustrates the application of these principles in analogous circumstances.[22] In *Pelican* two oil and gas companies had drilled wells into the same section. One company sued the other alleging conversion of oil and gas from the formation for which its well had been designated as the unit well. *Id.* at 211. The same contention had been previously made to, and rejected by, the OCC. The district court dismissed for lack of subject matter jurisdiction, holding that the action constituted a collateral attack on the OCC's order. *Id.* On appeal, the Court of Appeals acknowledged that the OCC had no power to award damages in a private lawsuit for

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[21] *Fent v. Oklahoma Nat. Gas Co.*, 898 P.2d 126, 135 (Okla. 1994).

[22] *Pelican* has persuasive but not precedential value under Oklahoma's court rules. 12 Okla. Stat. Ch. 15, App. 2, Rule 1.200.C(B). *See* Pet.App. 40, n.10.

conversion. However, the court affirmed, holding the district court had properly concluded that it lacked subject matter jurisdiction since the OCC's determination that the defendant was not in violation of its drilling and spacing order precluded any lawsuit for conversion. *Id.* at 212. The court observed that the OCC's order had become final, and that the plaintiff was "attempting to relitigate this issue in district court and, thus, is attacking the Commission's order collaterally." *Id.*

Other states similarly forbid a mineral lessor's claim based on alleged drainage which would constitute a collateral attack on the relevant oil and gas board or commission's orders.[23]

Here, the OCC has established Section 14 as a drilling and spacing unit and has rejected petitioners' efforts to drill more than the single allowed well in the unit. Petitioners' action against respondents for actual and punitive damages because of their *failure* to drill the well which the OCC has expressly disallowed, and which is otherwise prohibited by law, is an impermissible collateral attack on the OCC's orders. Pet.App. 19, 21.

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[23] *E.g., Trahan v. Superior Oil Co.*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (applying Louisiana law); *Mize v. Exxon Corp.*, 640 F.2d 637, 639-40 (5th Cir. 1981) (applying Alabama law); *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir.) (applying New Mexico law), *cert. denied*, 498 U.S. 942 (1990); *Mayer v. Tidewater Oil Co.*, 218 F.Supp. 611, 612-15 (W.D.La. 1963) (applying Louisiana law).

II. DUE PROCESS DOES NOT REQUIRE SPECIAL NOTICE OF THE POTENTIAL LEGAL EFFECT OF FOREGOING THE OPPORTUNITY TO BE HEARD

Petitioners' assertions that they were not notified of the purpose of Great Bear's application are contrary to the record, as recited above. However, petitioners also suggest that due process requires notice of the legal effect of the OCC's order on later possible proceedings,[24] a contention which was directed by petitioners to avoiding collateral estoppel in the Court of Appeals.[25]

If petitioners now mean to argue that due process required notice to them that an OCC order could not be collaterally attacked, petitioners cite no authority for the assertion and respondents are aware of none. Due process does not require notice of the application of a rule of law that uniformly applies to all citizens, nor must an individual be given special "advance notice before such a rule of law may operate." *Texaco, Inc. v. Short*, 454 U.S. 516, 537 (1982) (applying doctrine to Indiana statute causing severed mineral interests unused for 20 years to revert to surface owner). Further, there is no requirement even under preclusion doctrines that the precluded party be given notice in the prior proceeding that an unfavorable adjudication may be invoked against that party on

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[24] "The defendants never gave plaintiffs any notice that either would seek to use the proceedings before the Commission to pre lude their day before a court that could provide plaintiffs redress for their private claims." Petition at 7.

[25] The Court of Appeals accordingly found it unnecessary to reach the assertion. Pet.App. at 14 n.3.

related issues in later proceedings. *Cf.*, RESTATEMENT (SECOND) OF JUDGMENTS §§18-24 (claim preclusion), §§27-28 (issue preclusion).

The notice required by due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *GAC Enterprises, Inc. v. Medaglia (In re Medaglia)*, 52 F.3d 451, 455 (2d Cir. 1995). The purpose of the notice is to inform the recipient of the pendency of the matter in which his protected interests are at stake. *Moreau v. F.E.R.C.*, 982 F.2d 556, 569 (D.C.Cir. 1993).[26]

All OCC adjudicative proceedings must be accompanied by notice which satisfies federal and state due process standards. *Harry R. Carlile Trust v. Cotton Petroleum Corporation*, 732 P.2d 438, 442-44 (Okla. 1986), *cert. denied*, 483 U.S. 1021 (1987). Oklahoma requires service by mail whenever possible to ensure actual knowledge, *id.* at 444.

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[26] Even a person who receives no notice, but who has actual knowledge of the proceeding, has no complaint of denial of due process where the exercise of due diligence would have allowed preservation of the rights determined. *GAC Enterprises, supra; Moreau, supra.* Here, aside from the technical notices to petitioners shown by the record, petitioners had actual knowledge of their own lease provisions which made the lessees' obligations subject to all orders of the OCC. Pet.App. 5, 19-20.

Defendants cite *Hansberry v. Lee*, 311 U.S. 32 (1940) for the assertion:

> Due process requires notice of defendants' intentions in the Oklahoma Corporation Commission or a finding that plaintiffs had been adequately represented.

Petition at 7. In *Hansberry* the question was whether *res judicata* operated against an absent class member with whom the class representative had potentially conflicting interests. *Hansberry* is not apposite to the Court of Appeals' application of Oklahoma's prohibition on collateral attacks of OCC orders, 52 Okla.Stat. 1991, §111, to prevent petitioners from seeking damages against respondents for obeying OCC's specific order and Oklahoma statutory law prohibiting an additional well in Section 14.

Due process does not require special notice of the potentially preclusive effect of an adjudication in other proceedings, and certainly does not require notice before applying the prohibition on collateral attacks.

III. A COLLATERAL ATTACK ON AN OCC ORDER DOES NOT BECOME PERMISSIBLE ON THE GROUND THAT THE OCC CANNOT ADJUDICATE THE CLAIM THROUGH WHICH THE COLLATERAL ATTACK IS MADE

Petitioners' second proposition urges that they may not be "deprived of their claims" by a prior OCC decision unless the OCC had jurisdiction to adjudicate those claims. Petitioners' argument to this effect in the Court of

Appeals was, like their other ones, directed only to avoiding collateral estoppel. Petitioners attempt to adapt the argument to their petition by eschewing use of the term "collateral estoppel".

Petitioners cite and quote at length one case in support of their assertion. *Leck v. Continental Oil Co.*, 800 P.2d 224 (Okla. 1989). *Leck* was a decision on a certified question from the Tenth Circuit, and the Oklahoma Supreme Court expressly did not reach the issue of the preclusive effect (under either *res judicata* or collateral estoppel) of the OCC's findings because it was "not ripe for review." *Id.* at 228. However, after the certified questions were answered, both the district court and the Tenth Circuit did address the preclusion issue, holding opposite to petitioners' contentions here. *See Leck v. Continental Oil Co.*, 971 F.2d 604, 606-607 (10th Cir. 1992) (not cited by petitioners), holding that the mineral owners were precluded by a prior OCC order from seeking damages for failing to protect the unit from drainage. *Id.* at 605-606.

In *Leck*, the OCC had previously rejected an application to restrict production of a well in an adjoining unit because of alleged drainage. *Id.* at 606. Notwithstanding that the OCC did not have jurisdiction to adjudicate the private drainage claims asserted in the *Leck* litigation, the Tenth Circuit held those claims to be precluded by the OCC's order, since: "Implicit in the Commission's order denying Leck's application is a finding that the Wosika well was not causing substantial uncompensated drainage from the Leck unit." *Id.* at 606. Thus, the ultimate decision in *Leck*, by the certifying court, stands for the

opposite proposition for which petitioners cite the decision answering the certified question (where the court expressly did not reach the preclusion issue).

Petitioners' contention is also directly contrary to numerous authorities cited in Proposition II, where the collateral attack doctrine was applied regardless of the fact that the board or commission could not adjudicate the private claim. *E.g., Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987) (explicitly stating the OCC would have no jurisdiction over the conversion suit, but still applying collateral attack doctrine).[27]

Petitioners note in their statement of the case (and do not again mention) the Tenth Circuit's disavowal of overly broad dictum in *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir.), *cert. denied*, 375 U.S. 942 (1963) that an administrative tribunal's decision cannot have preclusive effect in a tort action. *See* Pet. App. 41-46, especially 44-46. In *Tidewater* the court held that a Kansas Corporation Commission order allowing water flood operations did not prevent plaintiffs' action for damages for trespass and nuisance for the destruction of their wells. The Commission had only *permitted* the flooding operations (not mandated them), and expressly stated in its order that " 'an action for damages for the flooding of producing wells may be available to the owners of such wells. . . . ' " 320 F.2d at 160. *See* Pet.App. at 41-42. The court recognized that the Commission's order was impervious to a

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[27] *See also* the Oklahoma quiet title and accounting cases cited with *Pelican, supra*, and the drainage cases from other jurisdictions cited in note 23.

collateral attack insofar as it allowed the water flood operations. *Id.* at 161. Moreover, the court reversed the punitive damages awarded notwithstanding that the Commission had expressly held it was not deciding any right to future actions for damages, because the operations were done under color of that Commission's permission. *Id.* at 165. This in itself is inconsistent with the dictum on which petitioners rely, as the Court of Appeals noted. Pet.App. 46 n.11.

Here, of course, respondents and all others were *prohibited* by the OCC's order from drilling another well. Plaintiffs did not sue respondents for failing to take an action within their lawful prerogative – but for failure to defy the lawful order of the OCC and Oklahoma statutory law prohibiting any additional well. Pet.App. 44. *Tidewater* is on its face of no assistance to petitioners in resisting Oklahoma's statutory prohibition on collateral attacks of OCC orders.

CONCLUSION

The petition for writ of certiorari should be denied.

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